May 7, 2019

Hon. Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: FOIA Amendments in Budget Support Act

ACLU
District
of Columbia

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Dear Chairman Mendelson,

We write to urge you to remove the "Freedom of Information Clarification Amendment Act of 2019" from the Budget Support Act that the Council will vote on next week.

Contrary to the statement at page 135 of the Committee of the Whole's draft Budget Report, the amendments are not "technical and clarifying amendments" at all. Indeed, as we understand them, they would substantially narrow and confuse the District's Freedom of Information Act (FOIA) in several major ways.

As written, these proposed amendments would:

- Exclude from FOIA some undefined set of government records;
- Encourage public agencies to withhold records on vague and arbitrary grounds;
- Impose an impossible burden on requesters to describe the records they want "with particularity," when requesters typically cannot know precisely what records exist in government files; and
- Impose a *de facto*, but undefined, limit on the quantity of records that can be requested.

We've included our analysis of these changes below. It is particularly troubling to us that the Council would propose to materially amend a statute that is meant to increase government transparency through such an opaque and truncated process, without official notice to the public and no scheduled opportunity for public input.

The amendments are also inappropriate for inclusion in the FY20 Budget Support Act because they have no substantial relationship to the budget. As you noted at your budget markup last Thursday, when recommending that many of the Mayor's proposed provisions be deleted, proposals that have no fiscal impact merit consideration as standalone legislation. This subtitle is no exception, and we ask that any such changes be afforded a full Council legislative process, complete with an opportunity for public input.

The ACLU-DC has many concerns about the confusing and narrowing language in the "FOIA Clarification Amendment Act" that we would have shared with you at a public hearing. For instance, one provision would add confusing redundancies into the Act's statement of purpose and another would treat an "email address" as if it were a "device." However, we've focused the following analysis on the gravest threats to transparency that arise from the proposed amendments.

I. The Proposed New Definition of "Reasonably Describing" Demands Impossible Specificity from FOIA Requests and Will Advance No Purpose Other Than Facilitating Agency Intransigence.

The phrase "reasonably describing" is used in FOIA's central provision: "[A] public body, upon request *reasonably describing any public record*, shall . . . make the requested public record accessible . . ." (Emphasis added.) The proposed amendments offer a new definition for that term, codifying it to mean:

> describing with particularity the public records requested by including the names of the sender and recipient, a timeframe for the search, and a description of the subject matter of the public record or search terms to allow a public body to conduct a search and review within the time prescribed pursuant to section 202(c).

According to the draft Budget Report, the new definition is needed to address "the Court of Appeals' holding in *FOP v. District of Columbia*, 139 A.2d 853 (D.C. 2016), [which] has rendered District agencies powerless to negotiate narrowing the scope of requests or to require specificity in describing requested documents, thereby resulting in the inefficient use of resources."

First, with all due respect, that is a gross mischaracterization of the effect of that case. Indeed, far from leaving District agencies powerless to negotiate regarding FOIA requests, the Court of Appeals specifically *ordered* the parties "to engage in mediation so that they might determine whether settlement is possible," *id.* at 870—an order that is hardly consistent with the proposition that FOIA somehow prohibits negotiation. Indeed, the ACLU-DC regularly negotiates issues related to its FOIA

requests with District agencies, including the Metropolitan Police Department, and has continued to do so since the 2016 *FOP* decision.

Second, the specificity requirement imposes needless and impossible burdens on FOIA requesters. The original federal FOIA required agencies to respond to requests for "identifiable records." But experience showed that agencies were withholding documents on the ground that they had not been "identified," even when the agency knew what records the requester wanted. *See Truitt v. Dep't of State*, 897 F.2d 540, 544-45 (D.C. Cir 1990). In 1974, Congress amended the statute to require a request "reasonably describing" the desired records, precisely to fix that problem. The D.C. Council adopted that language when it enacted the D.C. FOIA.

The courts have given this language an eminently reasonable construction, based on the legislative history noted above: a description is sufficient if it "enable[s] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Yagman v. Pompeo*, 868 F.3d 1075, 1081 (9th Cir. 2017) (quoting H.R. Rep. No. 93-876 at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271); *see also Truitt*, 897 F.2d at 545 n.36 (same); *Pub. Employees for Environmental Responsibility v. EPA*, 314 F. Supp. 3d 68, 74 (D.D.C. 2018) (same).

The proposed amendments would forego this approach in favor of one that would make things worse than they were in 1974. For example, under the proposed new text, requesters must include the "the names of the sender and the recipient." Yet some records—such as body-worn camera footage—may not have a specific "sender" or "recipient." Are citizens no longer to have access to those videos? Even when records have such information, ordinary citizens will have no way of knowing who sent a specific record and who received it; indeed, in many cases, requesters will not know that a particular record exists at all. Hence the logic of the approach taken by Congress and reaffirmed by the federal courts.

The proposed requirements not only would require the impossible, they are also nonsensical: if a reasonable description enables an agency to locate the records sought, no legitimate purpose is served by requiring the requester to identify specific records with particularity. All the amendment will do is encourage agencies to withhold easily located records because they were described in a general way, or because a requester got some detail wrong—the identity of the sender, or of the recipient, or the date, or the exact title.

Additionally, the proposed amendment requires a requester to describe requested records in a manner that will "allow a public body to conduct a search and review within the time prescribed pursuant to section 202(c)." (Presumably this means D.C. Code § 2-532(c), which generally provides for a response within 15 work days.) But because a requester cannot know how much time it will take an agency to

conduct a particular search, this amendment, like the others, would give agencies an excuse to deny requests that they prefer not to honor.

II. The Proposed New Definition of "Public Record" is Ambiguous and Would Constrain that Term's Scope and Result in Costly Litigation.

First, FOIA currently uses the definition of "public record" contained in the D.C. Administrative Procedure Act, D.C. Code § 2-502. Under that definition, the term "public record" includes "*all* books, papers, maps, photographs, [etc.], owned, used, in the possession of, or retained by a public body." (Emphasis added.) The proposed new definition would delete the word "all," so that "public records" would now presumably mean "*some* books, papers, maps, photographs, [etc.]," but not others. The proposed amendment provides no guidance as to which records would be included and which would not be. Agencies may use this ambiguity to classify records they wish to conceal as something other than a "public record" that they must disclose. Regardless of whether agencies exploit the proposed change, the uncertainty it introduces will result in time-consuming and expensive litigation as agencies and private parties fight over their competing interpretations in court.

Second, under the current definition, "Public records include information stored in an electronic format." The proposed new definition would insert the word "may," so that "a public record *may* include information stored in an electronic format[.]" (Emphasis added.) If a public record "*may* include information stored in an electronic format," it follows that in some cases a public record will *not* include information stored in an electronic format. Neither the text of proposed amendments nor the Budget report offers any guidance about which information stored in an electronic format would be included, and which would not be. As before, this ambiguity will impose litigation costs on organizations and agencies, while also leaving room for agencies to further any interests they have in non-disclosure.

Third, the proposed new definition would also insert the words "and related to the conduct of public business," so that public records would mean "books, papers, maps, photographs, [etc.], owned, used, in the possession of, or retained by a public body and related to the conduct of public business." There is no definition of "public business," meaning that this proposed change raises the same concerns about litigation costs and agency intransigence as the other ones do.

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For the above reasons, we respectfully request that the "Freedom of Information Clarification Amendment Act of 2019" be removed from the Budget Support Act. Doing so would give the Council time to address the concerns we have

raised and allow other members of the public to give meaningful input as well. We do agree that there are some problems with the way in which the D.C. FOIA is currently working, and we have in mind some amendments that we would like the Council to consider. We would be happy to work with you and your staff to explore some beneficial amendments to the statute as part of a freestanding bill.

Sincerely,

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